Appendix A

(Title of the Court and Cause—No. 559227)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The motion of defendant Helen H. Kincaid having come on regularly for hearing on the 26th day of January, 1966, before the above-entitled court, the Honorable Joseph Karesh presiding, Sullivan, Roche, Johnson & Farraher by Vincent J. Mullins and Daniel H. Dibert appearing on behalf of Helen H. Kincaid, George T. Davis appearing on behalf of Estelle Latta, Brobeck, Phleger & Harrison by E. Judge Elderkin appearing on behalf of Wells Fargo Bank, the Court being fully advised in the premises and the Court being satisfied that there are no triable issues of fact properly to be tried in this case, and that any alleged triable issues of fact are barred by the statute of limitations, laches and the doctrine of res judicata and collateral estoppel, and good cause appearing therefor,

It Is Hereby Ordered that defendant Helen H. Kincaid's motion for summary judgment be and hereby is granted.

Dated: February 4, 1966.

/s/ Joseph Karesh
Judge of the Superior Court

Approved as to form
Sullivan, Roche, Johnson & Farraher
/s/ Vincent J. Mullins
Dated: February 3, 1966.

Appendix B

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1 Civil No. 24,097

Wells Fargo Bank, a corporation,
Plaintiff, Cross-Defendant
and Respondent,
vs.
Helen Kincaid and Wachovia Bank
and Trust Co.,
Defendants, Cross-Defendants
and Respondents,
Estelle Latta,
Defendant, Cross-Complainant
and Appellant.

OPINION

Wells Fargo Bank, as trustee of an *inter vivos* trust, has commenced this action for declaratory relief and for instructions. Defendants are Helen H. Kincaid (and Wachovia Bank and Trust Company, her

assignee of part of whatever interest she may have) and Estelle Latta. Defendant Latta cross-complained against plaintiff and Helen Kincaid.

Helen Kincaid is the beneficiary under a power of appointment which was exercised by Lydia Hopkins. The trust was created by Lydia Hopkins' mother, Mary K. Hopkins, who was the widow of Timothy Hopkins. Timothy Hopkins acquired the estate from Mark Hopkins. There is no issue (at least for purposes of this appeal) as to the fact that the property presently in trust came to Timothy Hopkins as part of the estate of Mark Hopkins, or as converted assets thereof.

The superior court rendered summary judgment against appellant Latta, who laid claim to the properties of the trust, on the grounds that her cross-complaint is barred by the statute of limitations and that she was foreclosed by laches and by estoppel.

This is the claim of Estelle Latta, in substance: Mark Hopkins, the noted railroad magnate and financier, hereafter called the "real Mark Hopkins," never married and died intestate in San Francisco in 1878. His estate never has been administered, according to appellant. Estelle Latta is an heir of a brother of the real Mark Hopkins. The brother was an heir of the intestate capitalist. She and others claiming with her are entitled to the property which is the subject of this lawsuit. What happened to deprive her and her coheirs of their patrimony was that a second Mark Hopkins, an imposter, who was unrelated to the real

Mark Hopkins, was allegedly married to Mary Frances Sherwood Hopkins. Upon the death of the real Mark Hopkins, this woman caused distribution of a large amount of the estate of the real Mark Hopkins to her. Through her it has come ultimately into the subject trust fund.

Appellant asserts in her brief that she had "recently" uncovered the fraudulent scheme by which the alleged wrong described above was perpetrated by distribution of the estate of the real Mark Hopkins in 1883. She asserts that various distributees concealed the fraud. She seeks impressment of a trust.

It is to be observed that in the early stages of the litigation in which appellant sought to upset the distribution of the Mark Hopkins Estate, appellant's theory was not that there was an imposter Mark Hopkins, but that *the* Mark Hopkins was not really married to Mary Frances Sherwood Hopkins, to whom there was distributed, in 1883, the properties which are the source of the trust fund which is the subject of this suit. (See *Latta v. Western Inv. Co.*, 173 F.2d 99, 101.)

Applicability of Summary Judgment Procedure

Appellant misconceives the purport of a motion for summary judgment, saying that the court (presumably, the trial court and perhaps the Court of Appeal, too) "should only determine whether the *contentions* raise any triable issues of fact which are not barred by the asserted affirmative defenses." (Italics sup-

plied.) This is not the law of summary judgments (as distinguished from procedure relating to pleadings only, such as demurrer or motion for judgment on the pleadings). (*Hardware Mut. Ins. Co. v. Valentine,* 119 Cal.App.2d 125 [259 P.2d 70].) On motion for summary judgment the court goes beyond mere *contentions* of the parties as expressed in the pleadings, and examines the affidavits containing matters which are within the personal knowledge of the affiants to decide whether the stated facts (which are taken as true) show that a good cause of action exists upon the merits or that there is good and substantial defense. (Code Civ. Proc., § 437c; *Hicks v. Bridges,* 152 Cal. App.2d 146 [313 P.2d 15].) The purpose of the summary judgment is to dispose of cases and defenses which are unmeritorious in substance and fact which, by considering the pleadings only, might remain in court to the harm or harassment of parties and to the disadvantage and expense of the public, and in particular of other litigants. Of course, if there is even one triable issue of fact, summary judgment cannot be rendered. (*Eagle Oil & Refining Co. v. Prentice,* 19 Cal.2d 553 [122 P.2d 264].) If an action or defense is barred by the statute of limitations as established by affidavits which are not met by sufficient counteraffidavits, summary judgment is proper. (*Reiner v. Hermann,* 79 Cal.App.2d 543 [180 P.2d 385]; *Hayward Union High School Dist. v. Madrid,* 234 Cal.App.2d 100, 125-128 [44 Cal.Rptr. 268].) The same is true when the defense is that of res judicata. (*Dryer v. Dryer,* 231 Cal.App.2d 441, 446 [41 Cal.Rptr. 839], and cases cited therein.)

The Statute of Limitations

In order to escape the bar of the three-year statute of limitations in cases based on fraud (Code Civ. Proc., § 338, subd. 4), appellant contends that respondents have made no showing that appellant discovered the existence of the particular trust fund which is the subject of the litigation more than three years prior to the filing of the action or of appellant's cross-complaint. Although, as she says, the record is replete with references to her search for facts relating to the original fraud allegedly committed in 1883, there is no indication of her knowledge of the particular assets or of who held them.

The wrong which appellant contends was committed is one which, if done at all, was completed in 1883. It was then that final distribution was made of the assets and, of course, the decree was a judicial determination that what was distributed belonged to the Mark Hopkins whose estate was being administered and closed. The essence of appellant's case is that these assets had not belonged to this Mark Hopkins but somehow had gotten into the administration of his estate, while the true owner's estate was not administered at all.

If we assume, for present purposes, that the gigantic fraud was perpetrated successfully over 80 years before the present action was commenced, and if we further assume that the fraud was extrinsic and of such nature that relief could be had upon timely complaint following discovery, nevertheless appellant cannot succeed. Her "new" or "second" theory is itself several years old. In *Universal Land Co. v.*

All Persons, 172 Cal.App.2d 739 [342 P.2d 958], appellant presented the same allegation about the two men bearing the name "Mark Hopkins" (p. 740). Although the pleading in that case did not disclose when the alleged fraud was discovered (p. 744), it was sometime before August 10, 1959, when the opinion was filed, and therefore more than three years before the filing of appellant's cross-complaint in the present action on November 24, 1965, and before the complaint was filed on September 21, 1965.

Statutes of limitations, although commonly phrased in terms restricting only the commencement of actions, apply to causes of action raised by the defendant. (*Strong v. Strong,* 22 Cal.2d 540, 544 [140 P.2d 386].)

We do not accept appellant's proposition that the statute commences to run only when she learns that particular assets have derived ultimately from the estate of Mark Hopkins. In the case before us, the trustee, having notice of appellant's claims, has sought declaratory judgment by way of protection. This does not start anew the period for attacking the alleged ancient fraud. What steps appellant did take, or might have taken upon discovery of what she alleges to have discovered "recently," we need not speculate upon.* The fact is that she knew whatever she alleges now, more than three years ago. Her cross-complaint is barred.

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*Lydia Hopkins, the last surviving possessor of assets of the estate to be charged in the cross-complaint with concealment of the alleged fraud, died on January 8, 1965.

We need not undertake a comparison of the other litigation which respondents contend establishes a res judicata or collateral estoppel.

The summary judgment is affirmed.

Devine, P. J.

Rattigan, J., and Christian, J., concurred.

Filed March 15, 1968,
Lawrence R. Elkington, Clerk.

Appendix C

In the Supreme Court of the State of California

1 Civil No. 24,097

Wells Fargo Bank, a corporation,
Plaintiff, Cross-Defendant
and Respondent,

vs.

Helen Kincaid and Wachovia Bank
and Trust Co.,
Defendants, Cross-Defendants
and Respondents,

Estelle Latta,
Defendant, Cross-Complainant
and Appellant.

APPELLANT'S PETITION FOR A HEARING BY THE SUPREME COURT,

After Decision by the Court of Appeal, State of California, First Appellate District, Division Four, and Numbered Therein 1 Civil No. 24,097

City and County of San Francisco

Honorable Joseph Karesh, Judge

To the Honorable Roger J. Traynor, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The appeal in this action, brought for declaratory relief and petition for instructions relating to trust

agreement, was taken from a summary judgment granted under Section 437c of the Code of Civil Procedure against Appellant Estelle Latta and in favor of Respondent Helen H. Kincaid.

On March 15, 1968, an opinion and decision of the Court of Appeal, Division Four, was filed affirming the summary judgment of the Court below, against the appellant and petitioner herein, and in favor of the respondents, a true copy of which is set out in the appendix hereto. [See supra Appendix B.]

Petitioner herein contends that a hearing by the Supreme Court is necessary to secure uniformity of decision or the settlement of important questions of law (Cal. Rules of Ct. 29(a)(1)).

The issue raised by the pleadings involves a question of fact, viz., the entitlement of this petitioner or the respondent Helen H. Kincaid to the proceeds of a certain trust fund held by the respondent Wells Fargo Bank, all of which is more fully set out in appellant's opening brief and the complaint and answer of the respective parties, and are not here iterated in the interest of brevity.

Petitioner claims the aforesaid trust fund as an heir of the true owner thereof, and alleges that said trust fund was wrongfully distributed out of the estate of another unrelated decedent bearing the same name.

The right of a third person to recover property wrongfully distributed in probate is well settled by judicial decisions, of which the following are in point:

Archer v. Harvey, 164 Cal. 274, at page 278:

> "Nor does it [a decree distributing to heirs] bind third parties who claim an interest adverse to that of the testator or intestate."

Shelton v. Vance, 106 Cal. 2d 194, at page 197:

> "While a decree of distribution is conclusive as to the rights of heirs, legatees, or devisees, insofar as they claim in such capacities, it does not determine that the deceased had any title to property distributed; nor does it bind third persons who claim an interest adverse to that of the intestate or testator. It merely determines the succession or testamentary disposition of such title as the decedent may have had."

In Re Dabney Estate, 37 Cal. 2d 672, at page 677:

> "Nor is one who is claiming adversely to an estate properties which have been included in the estate bound by the probate court's order of distribution."

The Court of Appeal, by its decision has foreclosed petitioner's right to an adjudication of her claim to the trust fund. This it has done by holding that "she knew whatever she alleges now, more than three years ago. Her cross-complaint is barred."

The appellant, in her Opening Brief, page 12, pointed out:

> "On the face of the pleadings, that statute of limitations should not be considered a bar to Appellant since the most obvious basis of Appellant's 'discovery' of her cause of action is the fact

that she was sued herein in 1965. There is no showing made by Respondent to the contrary."

In the same brief, at page 13, Appellant stated:

"Appellant urges the court to consider the 'discovery' required under Section 338(4) to be when this suit was commenced, absent any other showing made herein.

It is also generally held that where a party alleges fraudulent concealment of facts relating to a cause of action, the 'discovery' under Section 338(4) does not occur until the party has knowledge of or should have had knowledge of the facts which constitute the basis of her cause of action. 1 Witkin, California Procedure, Actions, Section 144. Yet nowhere is it shown that Appellant had knowledge of the existence of this particular trust fund until the time of filing of the complaint or some undetermined time prior thereto. While the record is replete with references to Appellant's search to uncover the basic proof of fraudulent concealment complained of, there is no indication of her knowing of the existence of these particular assets, or who held them."

The Court of Appeal, in its decision, brushed aside Appellant's argument relating to the time when Appellant discovered the particular trust fund. The actual repudiation of liability, as a constructive trustee, by the respondent Helen H. Kincaid, did not occur until she filed her answer to the complaint, which was done on October 12, 1965. Consequently, the three year Statute of Limitations presented no bar to Estelle Latta's claim to the trust fund, and both the

trial and Appellate Court erred in finding to the contrary.

Petitioner submits that the Court of Appeal further erred in affirming the trial court's summary judgment decision for the reason that the declaration of respondent Helen H. Kincaid, set forth in the Clerk's and Reporter's Transcripts, page 26 to 30, inclusive, does not comply with the following mandatory provisions of Section 437c, second paragraph, of the California Code of Civil Procedure:

> "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto."

The declaration fails to allege that facts stated were within declarant's personal knowledge, and that, if sworn as a witness, she could testify competently thereto. See, *In re Nelson's Estate,* 227 A.C.A. 51, 38 Cal. Rptr. 459; *Orlando v. Berkeley,* 220 C.A. 2d 224, 33 Cal. Rptr. 860.

Wherefore, upon the foregoing grounds and matters, and because of the apparent defects and errors disclosed, it is respectfully urged that this petition for a hearing be granted, and the decision of the Court of Appeal affirming the summary judgment of the trial Court should be vacated and set aside, and a hearing awarded in this cause, and that the judgment of the

Superior Court of the State of California in and for the City and County of San Francisco be reversed.

Dated, San Francisco, California,
April 22, 1968.

Leon H. Sorell,
Attorney for Appellant
and Petitioner.

Appendix D

In the Supreme Court of the State of California

IN BANK

Wells Fargo Bank,
Plaintiff, Cross-defendant
and Respondent,
vs.
Kincaid, et al.,
Defendants, Cross-defendants
and Respondents,
Latta,
Defendant, Cross-complainant
and Appellant.

ORDER DENYING HEARING

After Judgment by the Court of Appeal
First District, Division 4,
1 Civil No. 24,097

Appellant's petition for hearing denied.

Filed May 9, 1968,
William I. Sullivan, Clerk.